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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-434-435-436

WILLIAM MILLIKEN, et al.,
Petitioners,

vs

RONALD BRADLEY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, PROFESSIONAL PERSONNEL OF VAN DYKE

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INDEX

	Page
Table of Authorities	i
Statement of Questions Presented	1
Statement of Case	3
Argument	9
Conclusion	13
Appendix	15

TABLE OF AUTHORITIES

Constitutional Provisions Cited

Michigan Constitution

Art #1, Sec 2	6
Art #5, Sec 29	6

Michigan Statutes

Act 336, Public Act of Mich (1947)	3, 12
Act 4, Public Acts of Mich (1937)	12
Act 36, Public Acts of Mich (1945)	12
Act 244, Public Acts of Mich (1969)	13

Authority Cited

Oliver v School District of Kalamazoo, 448 F2d 635	10

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STATEMENT OF QUESTION PRESENTED

Does the failure of the Trial Court to have granted Respondent, Professional Personnel of Van Dyke, the right to intervene, to introduce evidence as to the effectiveness and propriety of a "Detroit Only" Plan and to participate in the planning of a "Metropolitan Plan" violate due process of law?

(Professional Personnel of Van Dyke chooses to write on this question only. It corresponds to Question III (p 4) of the Brief of Petitioner, Allen Park School Systems and to Question 3 (p 3) of the Brief of Petitioner, Grosse Pointe Public School System. It is in agreement that the other question presented by the petitioners are properly presented; but it is of the opinion that such questions are already adequately discussed by such petitioners.)

STATEMENT OF THE CASE

Profesional Personnel of Van Dyke is an independent labor union, representing some three hundred and fifty-three teachers in the Van Dyke School District. It is the exclusive bargaining agent of such teachers, having been so elected under the appropriate statute of the state of Michigan (Act 336 Public Act of Mich. 1947). As such exclusive bargaining agency, it has entered into a labor contract, (called "Master Agreement" by the parties) with the School District of Van Dyke. Such agreement covers salaries, fringe benefits, class size, teacher assignments, grievance procedure and teacher responsibility.

The school district is located in southeast Macomb County (immediately north of Detroit). It has 7,500 students.

When, at the trial level, it first became apparent that the trial judge might fashion a remedy that encompassed school districts other than the defendant, School District of the City of Detroit, Professional Personnel of Van Dyke, petitioned for the right to intervene, or, in the alternative, for leave to intervene. This petition, filed on February 22, 1972, was denied by order dated March 15, 1972. Professional Personnel then filed a motion for rehearing of its original petition. Filed on April 11, 1972, the re-hearing was denied on June 29, 1972.

Professional Personnel of Van Dyke perfected an appeal on this issue to the Sixth Circuit Court of Appeals. It was not until July 2, 1973—some sixteen months after Professional Personnel of Van Dyke had filed its motion to intervene, that, in a per curiam opinion, the Sixth Circuit reversed the trial court. Of course, by this time—at least on the trial level—the material determinations to be made

in the case, had for all practical purposes been adjudicated.

Two other teacher organizations are parties to this cause. Early in the litigation, the Detroit Federation of Teachers was granted the right to intervene. (1A68). Denied the right to intervene by the trial court, the Michigan Education Association has filed Briefs Amici.

In its original complaint, the plaintiffs alleged that the Detroit School Board's "racially discriminatory policy, custom, practice and usage . . . has also included assigning faculty and staff members employed by the defendants to the various schools in the Detroit school system on the basis of race and color . . . " (1 Pet 12a) The trial court found to the contrary.[1]

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[1] Specifically, the trial court found (1 Pet 28a):

1. With the exception of affirmative policies designed to achieve racial balance in instructional staff, no teacher in the Detroit Public Schools is hired, promoted or assigned to any school by reason of his race.

2. In 1956, the Detroit Board of Education adopted the rules and regulations of the Fair Employment Practices Act as its hiring and promotion policy and has adhered to this policy to date.

3. The Board has actively and affirmatively sought out and hired minority employees, particularly teachers and administrators, during the past decade.

4. Between 1960 and 1970, the Detroit Board of Education has increased black representation among its teachers from 23.3% to 42.1%, and among its administrators from 4.5% to 37.8%

5. Detroit has a higher proportion of black administrators than any other city in the country.

6. Detroit ranked second to Cleveland in 1968 among the 20 largest northern city school districts in the percentage of blacks among the teaching faculty and in 1970 surpassed Cleveland by several percentage points.

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No evidence is presented that there is discrimination in the hiring practices of any of the school districts involved

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7. The Detroit Board of Education currently employs black teachers in a greater percentage than the percentage of adult black persons in the City of Detroit.

8. Since 1967, more blacks than whites have been placed in high administrative posts with the Detroit Board of Education.

9. The allegation that the Board assigns black teachers to black schools is not supported by the record.

10. Teacher transfers are not granted in the Detroit Public Schools unless they conform with the balanced staff concept.

11. Between 1960 and 1970, the Detroit Board of Education reduced the percentage of schools without black faculty from 36.3% to 1.2%, and of the four schools currently without black faculty, three are specialized trade schools where minority faculty cannot easily be secured.

12. In 1968, of the 20 largest northern city school districts, Detroit ranked fourth in the percentage of schools having one or more black teachers and third in the percentage of schools having three or more black teachers.

13. In 1970, the Board held open 240 positions in schools with less than 25% black, rejecting white applicants for these positions until qualified black applicants could be found and assigned.

14. In recent years, the Board has come under pressure from large segments of the black community to assign male black administrators to predominantly black schools to serve as male role models for students, but such assignments have been made only where consistent with the balanced staff concept.

15. The numbers and percentages of black teachers in Detroit increased from 2,275 and 21.6% respectively, in February, 1961, to 5,106 and 41.6%, respectively, in October, 1970.

16. The number of schools by percent black of staffs changed from October, 1963 to October, 1970 as follows:

Number of schools without black teachers—decreased from 41, to 4.

Number of schools with more than 0%, but less than 10% black teachers—decreased from 58, to 8.

Total number of schools with less than 10% black teachers—decreased from 99, to 12.

Number of schools with 50% or more black teachers—increased from 72, to 124.

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in this litigation. The 1963 Michigan Constitution expressly excludes such discrimination.

Art #1 Sec. 2 is as follows:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

And Art #5 Sec 29 makes this more than an empty promise. A Civil Rights Commission is mandated to enforce the rights envisioned in Art #1 Sec. 2:

> It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimina-

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17. The number of schools by percent black of staffs changed from October, 1969 to October, 1970, as follows:

Number of schools without black teachers—decreased from 6 to 4.

Number of schools with more than 0%, but less than 10% black teachers—decreased from 41, to 8.

Total number of schools with less than 10% black teachers—decreased from 47, to 12.

Number of schools with 50% or more black teachers—increased from 120, to 124.

tion. The legislature shall provide an annual appropriation for the effective operation of the commission.

Rules and regulations; hearings; orders

The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appropriate orders. The commission shall have other powers provided by law to carry out its purposes. Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.

Appeals

Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaint, shall be tried de novo before the circuit court having jurisdiction provided by law.

As noted hereinabove, Michigan Statutes encourages unionization of public employees. Most teachers in the desegregation area are organized; and most, if not all of such organizations are affiliated with either the American Federation of Teachers or the National Education Association. (It is believed that these two organizations are soon to amalgamate.) Professional Personnel of Van Dyke is not so affiliated. It has been certified as the sole bargaining agent of the teaching personnel of the Van Dyke School

System. For the past several years it has successfully negotiated collective bargaining agreements with the Van Dyke School System. These agreements control salaries, fringe benefits, class size, teacher assignment, grievance procedure and teacher accountability.

While the June 14, 1972 Order of the trial court (1 Pet 59a) was vacated by the Sixth Circuit Court of Appeals (1 Pet 178a) for the most part, an inkling of the scope of the trial court's proposed movement of teaching personnel can be gleaned from such order (1 Pet 102a)[2]

Such plan, in operation, will effectively put an end to meaningful collective bargaining between school districts and teacher organizations. To cite the more obvious examples: What school board will consider statements of teacher accountability as meaningful, if those contracting teachers will be assigned to other school districts; while teachers not bound by such statements, teach in its schools? What teacher organization would bargain

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[2] Faculty and staff shall be reassigned, in keeping with pupil desegration, so as to prevent the creation or continuation of the identification of schools by reference to past racial composition, or the continuation of substantially disproportionate racial composition of the faculty and staffs, of the schools in the desegregation area. The faculty and staffs assigned to the schools within the desegregation area shall be substantially desegregated, bearing in mind, however, that the desideratum is the balance of faculty and staff by qualifications for subject and grade level, and then by race, experience and sex. In the context of the evidence in this case, it is appropriate to require assignment of no less than 10% black faculty and staff at each school, and where there is more than one building administrator, every effort should be made to assign a bi-racial administrative team.

In the hiring, assignment, promotion, demotion, and dismissal of faculty and staff, racially non-discriminatory criteria must be developed and used; provided, however, there shall be no reduction in efforts to increase minority group representation among faculty and staff in the desegregation area. Affirmative action shall be taken to increase minority employment in all levels of teaching and administration.

for limited class size (a generally acknowledged student benefit), if the members of such organization would, in actuality, be teaching in a system of substantially larger classes? What teacher organization would be concerned with initiating a workable grievance procedure, if those grieved would be subject to the procedure of the "host" school board; and, per contra, what school board would be concerned with grievance procedure established by itself and the teacher organization, if such procedure would not apply to most of the teachers in its classrooms? One can project that the introduction of a metropolitan plan will sound the death knoll of local school boards and local teacher unions.

ARGUMENT

THE DECISIONS OF THE TRIAL COURT AND THE SIXTH CIRCUIT COURT OF APPEALS ARE VIOLATIVE OF DUE PROCESS OF LAW OF THE PROFESSIONAL PERSONNEL OF VAN DYKE.

The district court denied both the motion of Professional Personnel of Van Dyke (1 Pet 204) to intervene and its motion for re-hearing. It became necessary to appeal to the Sixth Circuit Court of Appeals. (Its order is appendixed hereto.) Hence, it was not until July, 1973, that this respondent became a party herein.

There is no gainsaying the fact that it was deprived of due process by being excluded entirely from trial procedures and deliberations from March 15, 1972 until July, 1973. In that period of time the entire complexion of the cause changed. For, it was in that period that the district court ruled on "Priopriety of Considering a Metropolitan Plan (1 Pet 48).; held hearing on Metropolitan Remedy (1a7), held hearing on desegregation, ordered the

purchase of transportation equipment (1 Pet 106), made its June 14, 1972 ruling on Finding of Fact and Conclusions of Law in Support of Ruling on Desegregation Area and Development of Plan (1 Pet 59) and instituted the so-called desegregation panel. (1 Pet 87a).

Wrongfully deprived of participation at both the trial level[3] and the appellate level (until August, 1973), as the Per Curian opinion of the Sixth Circuit intimates, Professional Personnel of Van Dyke is told by that same court that:

> The District Court may consider any evidence now on file and such additional competent evidence as may be introduced by any party. However, the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the "Detroit-only" plans of desegregation, dated March 28, 1972. We hold that the findings of fact contained in these rulings are not clearly erroneous. Rule 52(a), Fed. R. Civ. P., but to the contrary are supported by substantial evidence.

It is told not only that a plan may be mandated that will terminate its members' professional employment, transfer them to schools at distant places, reduce their

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[3] In *Oliver v School District of Kalamazoo*, 448 Fe 635, Sixth Cir Ct of App (1971), the following organizations were granted intervention: Kalamazoo, City Education Association, The Michigan Education Association, the National Education Association, The League of Women Voters of Michigan and the Kalamazoo Area League of Women Voters.

salaries, lose their tenure, but also, that they may make no input into such plan.

The Desegregation Panel as originally appointed by the district court on June 14, 1972, (1 Pet 98a) consisted of three members of the Detroit School Board, one member of the intervening suburban school boards, a designee of Dr. John Porter, state superintendent of public instruction, one member of the state department of Education, a member of the Michigan Civil Rights Commission, an "expert for plaintiffs" and an individual "representing defendant Magdowski et al [Detroit residents.]" The panel at a later date was enlarged to include the president of the Detroit Federation of Teachers and a member of the Michigan Education Association. If, arguendo, the work of the panel is to continue, and while it is not denied that the well being of some 750,000 students is paramount, nevertheless, the rights, duties, and obligations of the teaching personnel within the desegregation are of utmost importance to a viable educational process.

And although virtually all teaching personnel are members of professional organizations, their rights, at best, were to be protected by but two teacher organization oriented people, on a panel in which at least seven others clearly represented boards of education point of view. Such panel has no member speaking for independent teacher organization or for teacher organizations in the suburban schools comprising the desegregation area. Moreover, John Porter, State Superintendent of Public Instruction, alone, was ordered to prepare within forty-five days, an interim financial, administrative and governance proposal. In so doing, Dr. Porter informed the district court that it may be necessary to effectively "implement the desegregation proposal [to, *inter alia*, mandate

Amendment of, or a moratorium on, certain provisions of Act 336, Public Acts of 1947, the Public Empolyees Relations Act.

Amendment of, or a moratorium on, certain provisions of Act 4, Public Acts of 1937, the Teacher Tenure Act.

Amendment of Act 36, Public Acts of 1945, the Public School Employees Retirement Act.

Amendment of the Rules and Regulations Governing the Certification of Teachers." (1a, 286)

These rights of teachers, embodied in valid enactments, rules and regulations, are of long standing. They are fundamental to all teacher organization-school board contracts. They are gainsaid. To place a "moratorium on them" or to "amend them" would strike at the very core of teachers' economic position, their teaching morale and consequently, their teaching effectiveness.

There can be no question that the State of Michigan has the right to enact legislation giving the teachers the right to organize for collective bargaining purposes, the right to pensions, the right of job security (tenure) and the right to be certified. The State of Michigan constitutionally can and has determined that there is a compelling state interest in regulating conditions of employment and to define the rights and obligations of teachers.

That the state legislatures may determine that it prefers local administration of educational policy is established by the writings of all of the Justices of this Court. (See Brief of Petitioner, Grosse Pointe Public School System No 73-436 Argument IVB pp 46-57). School districts, in fact, are being *decentralized*. Michigan has en-

acted "An act to require first class school districts to be divided into regions and to provide for regional boards and to define the powers and duties of first class school boards." (Act 244 Public Acts of Mich 1969).

In substance such enactment and its amendments provide that each district over 100,000 be divided into eight regions. Regional boards are elected. They have the power to

A. Employ a superintendent

B. Employ, discharge, assign and promote all teachers.

C. Determine curriculums, use of educational facilities, establish educational and teaching programs.

D. Determine budget.

CONCLUSION

Thus, it is the established policy of Michigan to have a small, locally controlled educational program. It is the established policy of the State of Michigan to provide statutory benefits to its teachers. It is the established policy of the State of Michigan to protect and promote the collective bargaining right of teachers organized into collective bargaining units of their own choice.

These policies are of long standing. They are racially non-discriminatory. (In fact, they have been given credit for the encouraging progress that black teachers have made in, at least, the Detroit School System.) They serve valid governmental goal.

No constitutional wrong has been shown herein that makes necessary the disruption—if not termination—of these valid declarations of public policy.

Respectfully submitted,

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APPENDIX

Act 336 Public Act of Mich 1974 Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to this employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

ORDER

(U. S. Court of Appeals—Sixth Circuit)

(Filed July 2, 1973)

In re Appeal of
Professional Personnel of Van Dyke,
Appellants.

Ronald Bradley, et al.
v.
William G. Milliken, et al

No. 72-2008

Before Phillips, Chief Judge, and Edwards and Peck, Circuit Judges.

This is an appeal by Professional Personnel of Van Dyke, which is the exclusive bargaining agent for the teaching personnel of the Van Dyke School District. Appellants undertook to intervene in the District Court in the case of *Bradley* v. *Milliken*. On March 15, 1972, the District Court denied the motion of appellants to intervene. On April 11, 1972, appellants filed a petition for rehearing of their motion to intervene. On June 29, 1972, the District Court affirmed its previous denial of the motion.

Upon consideration, it is Ordered that the decision of the District Court denying to appellants the right to intervene is vacated and the case is remanded to the District Court with directions to grant the motion to intervene.

Entered by order of the court.

/s/ James A. Higgins,
Clerk